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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN
FRANCISCO, et al.,

Plaintiffs,

v.

PURDUE PHARMA L.P., et al.,

Defendants.

Case No. 18-cv-07591-CRB

**ORDER RE BOARD OF PHARMACY
MOTION TO QUASH AND
WALGREENS' MOTION TO COMPEL
DOJ TO PRODUCE CURES DATA**

Dkt. 282, 465, 498

Walgreens Co. ("Walgreens") issued subpoenas to two non-party state agencies, the California Board of Pharmacy (the "Board") and the California Department of Justice (the "DOJ"), seeking various datasets from the California Controlled Substance Utilization Review and Evaluation System (California's "CURES" database). See Dkt. 282 at 8-9; Dkt. 465-13. The CURES database is maintained by the California government and contains information about patients, prescribers, and pharmacies related to prescription drug sales (Schedule II, III, IV, and IV controlled substances) in California. CURES is the authoritative and most complete source of data on opioids dispensing in California. The state agencies object to the subpoenas.

After carefully considering the parties' written submissions, and having had the benefit of oral argument on March 27, 2021, the Court finds that the CURES data sought from the DOJ is relevant to Walgreens' defense, is unprivileged, and that its production does not impose an undue burden. Further, the Court finds that privacy concerns related thereto can be adequately addressed by the existing protective order in this case, by the terms of this Order, and by de-identifying the at-issue data. Therefore, the Court GRANTS Walgreens' motion to compel the DOJ to produce

1 the CURES data requested.¹ However, because the data Walgreens seeks from the Board is
 2 largely duplicative of that the DOJ will produce and where not duplicative it is irrelevant, the
 3 Court GRANTS the Board's motion to quash Walgreens' subpoenas. The Court's rationale is
 4 explained below.

5 **LEGAL STANDARD**

6 "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any
 7 party's claim or defense and proportional to the needs of the case, considering the importance of
 8 the issues at stake in the action, the amount in controversy, the parties' relative access to relevant
 9 information, the parties' resources, the importance of the discovery in resolving the issues, and
 10 whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R.
 11 Civ. P. 26(b)(1). The rule applies equally to both litigants and third parties. See Seattle
 12 Times Co. v. Rhinehart, 467 U.S. 20, 30 n.15 (1984).

13 Additionally, Rule 45 of the Federal Rules of Civil Procedure provides that a court must
 14 quash or modify a subpoena that "(iii) requires a disclosure of privileged or other protected matter,
 15 if no exception or waiver applies or (iv) subjects a person to undue burden." Fed. R. Civ. P.
 16 45(d)(3)(A)(iii)-(iv).

17 **DISCUSSION**

18 **A. DOJ Subpoena**

19 Walgreens seeks CURES dispensing data for eight opioids (and other non-opioid drugs)²
 20 in nine Bay Area counties³ dating back to January 1, 2012 and up until the present. See Dkt. 465

21
 22 ¹ The DOJ also seeks a stay and reconsideration of the Court's March 5, 2021 Order compelling
 23 the production of de-identified CURES data in the possession of one of Plaintiff's
 24 epidemiologists. See generally Dkt. 498. The DOJ advances privilege and confidentiality
 25 arguments in favor of its motion. See id. at 2. For the reasons addressed in this Order finding in
 26 favor of Walgreens' motion to compel, the DOJ's motion for a stay and for reconsideration is
 27 DENIED. However, as with Walgreens' motion to compel, the Court orders Walgreens not to use
 28 the CURES data Plaintiff produces under the March 5, 2021 Order to "reverse-engineer" any
 identifying information contained in the de-identified data it receives.

2 The at-issue drugs are Fentanyl, Hydrocodone, Hydromorphone, Methadone, Morphine,
 Oxycodone, Oxymorphone, Tapentadol, Alprazolam, Chlordiazepoxide, Clobazam, Clonazepam,
 Clorazepate, Diazepam, Estazolam, Flurazepam, Lorazepam, Midazolam, Oxazepam, Quazepam,
 Temazepam, Triazolam, Carisoprodol, Cyclobenzaprine, Orphenadrine, and Tizanidine. See Dkt.
 465-15.

³ The nine Bay Area counties are Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo,

1 at 7; Dkt. 465-15; Dkt. 497 at 1. In particular, it seeks the following data fields: (1) drug name;
 2 (2) NDC number; (3) date prescription was filled; (4) quantity and strength prescribed; (5) days'
 3 supply; (6) prescriber's name; (7) prescriber's DEA number; (8) patient zip code; (9) patient ID
 4 number (unique ID); (10) number of refills authorized (if any); (11) refill indicator (whether the
 5 Rx is a refill or the original); (12) pharmacy store # or name; and (13) pharmacy license number.
 6 Dkt. 465-10 at 8. Walgreens asks that the patient ID number be de-identified and agrees that it
 7 will not take any steps to identify who any patient is.

8 **1. Relevancy**

9 The threshold issue is whether the CURES data is relevant to Walgreens' defense. See
 10 Fed. R. Civ. P. 26(b). As the Court has previously noted, this case is about the prescribing,
 11 dispensing, and distribution of opioids and the alleged damage opioids have caused San Francisco.
 12 See Dkt. 482 at 5. Walgreens' theory is that the data will assist it in proving "alternative causes of
 13 the alleged public nuisance, including the large number of pharmacies, doctors, and other
 14 dispensers of opioids Plaintiff chose not to sue." See Dkt. 465 at 6. In other words, according to
 15 Walgreens, the "true cause" of the alleged nuisance is not its own pharmacies and dispensing
 16 decisions, but the actions of these numerous non-party actors. See id. Walgreens is entitled to
 17 steer its own defense and, this being its chosen theory, is entitled to data supporting its claim.

18 The Court's conclusion that the CURES data is relevant to Walgreens' defense is
 19 consistent with Judge Polster's decision in the MDL regarding the same issue. See Dkt. 465-13 at
 20 4 (citing MDL Doc. 3395). There, where pharmacy defendants in Track Three were seeking
 21 statewide opioids data from Ohio's CURES analog (i.e., a state-controlled pharmacy dispensing
 22 database), the MDL Court called the data "clearly relevant," noting that "the Pharmacies cannot
 23 pursue a potential defense without the actual identities contained in the OARRS data fields they
 24 seek." Id. at 5. Nothing about the instant case or subpoena suggests the Court should reach a
 25 different outcome.

26 The DOJ's reliance on Board of Registered Nursing v. Super. Ct. of Orange Cty., 59

27
 28 Santa Clara, Solano, and Sonoma. See id.

1 Cal.App.5th 1011, 1045 (2021), to support its insistence that the data is not relevant is
2 unpersuasive. First, the subpoenas at issue there were issued by manufacturer defendants, not
3 pharmacies; thus, the relevancy issues were different and the Court of Appeals' reasoning is
4 inapplicable. See id. Second, Walgreens' request here is significantly narrower than the subpoena
5 in Board of Registered Nursing. See id. at 1045-46 (requesting 30 years' worth of statewide data
6 for all prescription opioids). The CURES data sought from the DOJ is relevant to Walgreens'
7 defense.

8 **2. Privilege and privacy concerns**

9 **a. Privilege**

10 The DOJ also argues that the CURES data is shielded from disclosure due to the "official
11 information" and related "deliberative process privilege."

12 The official information privilege is available when the confidentiality interest in
13 government-maintained information outweighs the interest in disclosure to advance justice. See
14 Sander v. State Bar of Cal., 58 Cal.4th 300, 325 (2013). To determine whether the official
15 information privilege bars disclosure, the Court must weigh (a) the necessity of preserving the
16 confidentiality of the government's information against (b) the necessity for disclosure in the
17 interest of justice (i.e., the public interest). See Sander v. State Bar of Cal., 58 Cal.4th 300, 325
18 (2013) ("Th[e] principle is currently reflected in [California] Evidence Code section 1040, which
19 provides a privilege to a public entity to refuse to disclose information acquired in confidence if
20 'there is a necessity for preserving the confidentiality of the information that outweighs the
21 necessity for disclosure.'") (internal citation omitted).

22 While the CURES data is arguably "official information," the DOJ does not have a
23 privilege to refuse disclosure in this case. First, the CURES statute and related regulations
24 expressly contemplate disclosure during some civil litigation. See Cal. Health & Saf. Code, §
25 11165, subd. (c)(2)(A); see also Board of Registered Nursing, 273 Cal.App.5th at 1045 (calling
26 the CURES statute's limits on disclosure "not particularly strict, since numerous governmental
27 and nongovernmental entities and individuals have access or can obtain access to CURES data.").
28 Second, the data is relevant to Walgreens' defense and, as explained below, any privacy concerns

1 can be ameliorated. Third, assuming a balancing of interests is required (notwithstanding that the
2 CURES statute and regulations expressly contemplate disclosure in civil litigation), that balancing
3 warrants production. The City and County of San Francisco has alleged that Walgreens failed to
4 maintain effective controls to prevent diversion of prescription opioids creating a public nuisance.
5 Dkt. 13 ¶¶ 555–56, 563–78. Further, San Francisco seeks tens of millions of dollars, if not more,
6 to remedy the public nuisance. Walgreens’ analysis of the CURES data may help Walgreens
7 understand the scope and sources of the opioids crisis in the Bay Area. Thus, it is relevant to
8 Walgreens’ defense under Plaintiff’s nuisance claim and it is relevant as to the amount of money
9 that Plaintiff seeks to collect from Walgreens..

The deliberative process privilege is available when the material demanded in a subpoena request implicates the mental processes of government officials. The critical question is “whether the disclosure of materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.” Times Mirror Co. v. Superior Ct., 53 Cal. 3d 1325, 1342 (1991). DOJ does not articulate, and the Court cannot imagine, how disclosure of the requested CURES data implicates any DOJ mental processes.

17 The CURES data is not shielded from production by a privilege.

b. Privacy

19 Next the DOJ argues that the Court should not compel it to produce the CURES data
20 because Walgreens did not provide notice of the subpoena to the patients, prescribers and
21 pharmacies whose information Walgreens seeks. The California Code of Civil Procedure,
22 §1985.3(b), requires a party subpoenaing the production of records containing “personal
23 information” of a “consumer” to provide the consumer with notice of the subpoena prior to the
24 deadline for responding to the subpoena. This notice procedure applies to state agencies such as
25 the DOJ. Cal. Code Civ. Proc. § 1985.4 (stating that the procedures of §1985.3(b) apply to
26 records maintained by state agencies); Board of Registered Nursing, 59 Cal.App.5th at 905. A
27 consumer in this context is “any natural person”. Cal. Code Civ. Proc. § 1985.4; Board of
28 Registered Nursing, 59 Cal.App.5th at 906. Section 1985.4 adopts the definition of “personal

1 information" set forth in California Civil Code § 1798.3:

2 any information that is maintained by an agency that identifies or
3 describes an individual, including, but not limited to, his or her name,
4 social security number, physical description, home address, home
5 telephone number, education, financial matters, and medical or
6 employment history. It includes statements made by, or attributed to,
7 the individual.

8 Cal. Civ. Code § 1798.3(a).

9 The notice procedure applies to the prescriber data Walgreens seeks. Prescribers—
10 physicians—are natural persons and thus "consumers" under the statute. Further, as Walgreens
11 seeks their names in connection with their prescription records, Walgreens seeks their "personal
12 information" as defined by the statute.

13 The notice procedure does not apply to pharmacy records as pharmacies are not "natural
14 persons" and are therefore not "consumers" within the meaning of section 1985.4. However, it
15 might apply to the extent that the "pharmacy" records would or could identify a specific
16 pharmacist—a natural person. As the DOJ did not offer any evidence or argument on this point,
17 the Court does not know the answer.

18 The notice procedure also does not apply to the patient prescribing information because
19 Walgreens seeks de-identified data; that is, it does not seek any patient's name, only a unique ID
20 number for each patient. See supra at 2-3. In Board of Registered Nursing, the California Court
21 of Appeal recognized that "patient identifying information would require defendants to serve
22 consumer notice on those patients whose information would be produced." 59 Cal.App.5th at 913.
23 It also observed that even the production of data with unique identifiers may require consumer
24 notice, "depending on the nature of the data and the ability of the vendor or the defendants to re-
25 identify the patients." Id. Here, the DOJ has not identified precisely how Walgreens could re-
26 identify the patients, besides offering conclusory accusations, and the Court is ordering that
27 Walgreens take all measures to ensure the data is not re-identified. Further, the data will be
28 produced subject to a protective order which limits the disclosure of the information to outside
counsel and that permits disclosure only to a single member of in-house counsel. With these
protections in place, there is no reasonable possibility that any patient, prescriber or pharmacist

1 can be identified. Therefore, the privacy protections and concerns that the DOJ espouses, while
2 legitimate, are not insurmountable hurdles. Nor do these concerns outweigh Walgreens' need for
3 the information and its relevance to this opioids dispute, particularly given the protections that the
4 Court has put in place.

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7 As the sought-after CURES data is relevant and not privileged, but as Walgreens has not
8 provided notice to prescribers, the Court GRANTS Walgreens' motion to compel under the
9 following conditions: (1) the information sought by the subpoena is to be produced under the
10 existing protective order in this case and all information produced thereunder shall be designated
11 as "highly confidential" (meaning those materials may only be seen by outside counsel and a
12 single identified member of in-house counsel); (2) the data requested, insofar as it relates to
13 patients and prescribers, shall be produced in "de-identified" form (i.e., using unique identifiers in
14 the place of all personal information)⁴; (3) Walgreens shall not use the CURES data produced by
15 the DOJ to "reverse-engineer" any identifying information contained in the de-identified data it
16 receives; and (4) Walgreens shall pay DOJ up to \$2000.00 for the costs of the production.

17 Insofar as Walgreens continues to seek identifiable prescriber information from the DOJ,
18 the most-productive course is for Walgreens to review the de-identified data and then to identify
19 particular prescribers (by unique ID number) if it wishes to do so. Walgreens has no interest in
20 (nor can it persuasively argue that it needs) the identities of most prescribers to put on its defense.
21 However, to the extent Walgreens identifies prescribers whose identities it believes are necessary
22 to prove its defense, it can meet and confer with the DOJ as to whether and how the notice can be
23 provided. If the parties remain at impasse, they shall bring the dispute to the Court's attention
24 through a joint letter brief.

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27 ⁴ As explained, the de-identifying may also have to apply to pharmacy information to the extent
28 such information will identify a particular pharmacist. The parties must meet and confer on this
issue.

B. Board of Pharmacy

1 The Board also moves to quash a subpoena from Walgreens seeking de-identified CURES
2 data contained in the investigative files of a select nine Bay Area pharmacists who lost their
3 licenses for improper opioids dispensing.⁵ The Court GRANTS the motion to quash.
4

5 First, the data contains “personal information” of the at-issue pharmacists (natural persons)
6 and, therefore, Walgreens was required to give notice of the subpoena to each pharmacist. Cal.
7 Code Civ. Proc. 1985.4. For this reason alone, the subpoena must be quashed. Second, the
8 CURES data is duplicative of that which the Court is ordering the DOJ to produce by this Order.
9 Third, to the extent the data is not duplicative (i.e., to the extent the data reveals what information
10 the Board believed relevant in its investigation of the at-issue pharmacists or pharmacists in
11 general), it is protected by the deliberative process privilege. Times Mirror Co., 53 Cal. 3d at
12 1342. Fourth and in any event, the Board’s internal machinations and deliberations related to its
13 investigations are not relevant to Walgreens’ defense as stated herein. This case is not about
14 whether the Board did or did not investigate or discipline particular pharmacists; it is about
15 whether Walgreens’ conduct was a substantial contributing factor in San Francisco’s opioid
16 epidemic. To the extent Walgreens wants to argue that its pharmacists were not disciplined, it can
17 do so without relying on the Board’s deliberative processes. Walgreens also has access to public
18 information as to which non-Walgreens pharmacists were disciplined. Nothing more is needed
19 from the Board. Therefore, the Board’s motion to quash is GRANTED.

CONCLUSION

20 For the foregoing reasons, the Court GRANTS Walgreens’ motion to compel (Dkt. 465),
21 GRANTS the Board’s motion to quash (Dkt. 282) and DENIES the DOJ’s motion for a stay and
22 for reconsideration of the Court’s March 5, 2021 Order compelling production of de-identified
23 CURES data in the possession of one of Plaintiff’s epidemiologists (Dkt. 498).

24 This Order disposes of docket entries 282, 465, and 498.

25 **IT IS SO ORDERED.**

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28 ⁵ Walgreens originally included in its subpoena a request for a Rule 30(b)(6) witness but it has
since withdrawn that request. See Dkt. 466 at 1.

United States District Court
Northern District of California

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Dated: March 23, 2021.

Jacqueline Scott Corley
JACQUELINE SCOTT CORLEY
United States Magistrate Judge